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MSHA V. UPRIGHT MINING
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FMSHRC-WDC
FEB 10, 1987

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. KENT 86-115

UPRIGHT MINING, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on January 26, 1987, finding Upright Mining, Inc. ("Upright") in default for failure to respond to a show cause order. The judge assessed a civil penalty of \$578. The record indicates, however, that shortly before issuance of the default order Upright in fact had filed with the Commission its response to the show cause order; due to certain unusual circumstances this response was not brought to the judge's attention until after issuance of the default order. We vacate the default order and remand for further proceedings.

On February 24, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ('MSHA') issued to Upright a citation alleging a violation of 30 C.F.R. § 70.208 for failure to submit a required respirable dust sample. On March 11, 1986, Upright received an imminent danger order and citation alleging a violation of 30 C.F.R. § 75.200 for inadequate roof support. Upon preliminary

notification by MSHA of the civil penalties proposed for these alleged violations. Upright filed a "Blue Card" request for a hearing before this independent Commission. On June 30, 1986, the Secretary of Labor filed a Proposal for Assessment of Civil Penalty seeking a \$578 penalty. Upright did not file an answer to the penalty proposal.

On November 13, 1986, Judge Merlin issued an Order to Show Cause directing Upright to file an answer to the penalty proposal within 30 days or be placed in default. Upright did not respond within the 30 days, and on January 16, 1987, the Secretary filed a Motion for Summary Decision. On January 22, 1987, the Commission's Docket Office received Upright's response to the show cause order. Due to circumstances created by a local snow emergency, Upright's answer was not routed internally to the judge's attention until the day after his default order was issued on January 26, 1987.

The judge's jurisdiction in this matter terminated when his default order was issued on January 26, 1987. 29 C.F.R. § 2700.65(c). Under the unusual circumstances presented, we regard Upright's response to the show cause order as constituting, in effect, a timely request for review of the judge's default order. Cf. Mohave Concrete & Materials, Inc., 8 FMSHRC 1646 (November 1986).

We recognize that Upright's response/answer was filed beyond the time limit set by the judge in his show cause order, and Upright has not provided any explanation for its late filing. Nevertheless, in mitigation, we assign weight to the fact that Upright filed a response before the default order was issued. Cf. Sigler Mining Co., 3 FMSHRC 30 (January 1981)(attempt to comply at least partially with a judge's order may be a mitigating factor in default situations). Inasmuch as Upright has not explained its late filing, we are not prepared to rule summarily. In fairness, however, we conclude that Upright should be afforded the opportunity to explain its late filing to the judge, who shall determine whether relief from default is warranted. Cf. Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

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For the foregoing reasons, the judge's default order is vacated and the matter is remanded for proceedings consistent with this order. Upright is reminded to serve the opposing party with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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